Supreme Court, U.S.
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No. 97-1179

In The

Supreme Court of the United States

October Term, 1997

RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should reconsider and reverse its holdings in *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1075-77 (1996) and *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068-69 (1993) that "damages," *i.e.*, monetary relief, are not "equitable" relief available as the only permissible relief under ERISA, 29 U.S.C. § 1132(a)?

2. Whether, in the absence of any conflict between the lower courts as to the principle that the operation of ERISA's preemption clause (29 U.S.C. § 1144(a)) does not depend upon whether ERISA provides a remedy to plan participants that is similar to an available state law remedy, the Court should reconsider its holdings in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), that Congress, in ERISA, intended to deny to the states any authority to regulate the design and administration of ERISA plan benefits?

3. Whether the Court has the authority to, and should, create a remedy involving compensatory and punitive damages against an ERISA plan fiduciary for an assertedly wrongful benefit denial decision, where neither the claimant nor the affected plan beneficiary timely sought available judicial review and equitable relief with respect to the fiduciary's coverage determination?

STATEMENT PURSUANT TO RULE 29.6

Fallon Community Health Plan, Inc., is a subsidiary of The Fallon Foundation which, in turn, is a subsidiary of Fallon Clinic, Inc. Fallon Clinic, Inc.'s shareholders are its physician employees and two wholly owned "second tier" subsidiaries of the Tenet Corporation, which hold a minority of the shares. Fallon Community Health Plan, Inc. does not have subsidiaries other than those which are wholly owned, nor does it have any affiliates that have issued shares to the public.

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case omits certain parts of the record, and misstates others, which may bear upon the Court's determination whether a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review its judgment in this case should issue. Petitioner contends that Fallon Community Health Plan, Inc.'s (hereafter "FCHP") decision not to cover the cost of a high dosage chemotherapy/autologous bone marrow transplant (hereafter "HDC/ABMT") protocol devised by Duke University Medical School "was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of fiduciary duty." Petition at 2.

The Appeals Court found, however, that FCHP's determination that Duke's HDC/ABMT protocol was not a covered plan benefit was warranted by the plain terms of the plan of coverage applicable to Petitioner's claim.

> Although the question of a damages remedy is an important one, it likely has no practical importance in this case. The central obligation of Fallon to Charlotte Turner is fixed by the terms of the health plan, and it would be difficult to find an exclusion more unequivocal than Fallon's written exclusion of bone marrow transplant for solid tumors.[1] Even if Fallon were treated as having modified the contract in August 1997,[2] the modification seemingly extended only to the Dana

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1. It is undisputed that Charlotte Turner suffered from breast cancer that was a solid tumor cancer. *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 197 (1st Cir. 1997).

2. The 1997 date is a typographical error. The date is August 1993. *Turner*, 127 F.3d at 196-97, 200.

> Farber program, for which Charlotte Turner was admittedly ineligible. Thus, anything akin to a contract claim looks almost hopeless on this record.

Turner, 127 F.3d at 200.

With respect to Petitioner's state tort claims, the Appeals Court said this: "It is difficult to see how denial of an expressly excluded treatment could support a negligence claim. . . ." *Id.* Plainly, the Appeals Court concluded that, even if all applicable precedent were not against Petitioner's assertion that ERISA should provide compensatory and punitive damages as a remedy for a wrongful benefit denial, the incontrovertible facts compel the conclusion that no covered benefit was denied wrongly by FCHP. This is not a case, therefore, in which the Court's rejection of its own clear precedent as now sought by Petitioner, would result in a different substantive outcome for the Petitioner. Even if ERISA were construed to provide the remedies of compensatory and punitive damages, Petitioner's claim would fail because, as the Appeals Court decision unambiguously concludes, no covered benefit was denied to Mrs. Turner by FCHP.

REASONS FOR DENYING THE WRIT

There is no warrant for review of this case by the Court because its clear and consistent precedent holds that: (1) ERISA does not allow for either compensatory or punitive damages as a remedy; and (2) ERISA preemption of state law claims does not depend upon the existence of a parallel or analogous remedy under ERISA. In addition, ERISA does provide to plan participants and beneficiaries access to timely judicial equitable relief to remedy assertedly improper benefit denial decisions by plan fiduciaries. Moreover, Petitioner has not identified any conflicts between the Circuit of Courts of Appeal as to the issues

addressed and resolved by the Appeals Court for which Petitioner seeks review. In fact, no such conflicts exist. Last, as the Appeals Court pointed out, the revision to ERISA law sought by Petitioner calls for the exercise of legislative, not judicial, authority.

The Court clearly and unambiguously held in *Mertens*, 113 S. Ct. at 2068-69, that damage remedies, indeed all legal remedies, are not available under ERISA, which allows only for equitable remedies. This holding is reaffirmed in *Varity Corp.*, 116 S. Ct. at 1075-79. Indeed, it has been clear for more than a decade that neither compensatory nor punitive damages are available remedies under ERISA. *Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134 (1985). *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 47, 52-53 (1987).

Petitioner argues that because ERISA does not provide a remedy in damages for a wrongful benefit denial in circumstances when damages alone would be the only meaningful remedy, it cannot preempt state law claims that would allow the remedy in damages. This argument runs directly counter to the fundamental and indisputable proposition that Congress, in ERISA, specifically intended to deny to the states the authority to regulate ERISA plans with respect to such plans' design and administration of benefits. *Cf. Ingersoll-Rand*, 498 U.S. 144; *Pilot Life Insurance Co.*, 481 U.S. 52-57.

The Circuit Courts which have been confronted with Petitioner's argument that the absence of an ERISA remedy for an asserted wrong to a plan beneficiary requires the conclusion that ERISA does not preempt state laws that allow a remedy for the alleged wrong, all uniformly have rejected that argument. *See, e.g., Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995). ("Nevertheless, plaintiffs argue that ERISA cannot preempt their state law claims because ERISA provides

no adequate remedy for the wrongs they allege. . . . Plaintiffs misconstrue the nature of ERISA preemption. That ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption."); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792-94 (1st Cir. 1995); *Cf. Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1537-38 (10th Cir. 1993) ("[W]e note that the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.). . . . *Cromwell v. Equicor HCE Corp.*, 944 F.2d 1279, 1276 (6th Cir. 1991) ('Nor is it relevant to an analysis of . . . preemption that appellants may be left without a remedy.') . . . *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989))."

In *Lee v. E.I. Dupont de Nemours and Co.*, 894 F.2d 755, 756-57 (5th Cir. 1990), plaintiffs

> [p]ropose[d] a novel rule for construing [ERISA's preemption clause]. They argue that the scope of preemption should turn on the scope of . . . the ERISA civil enforcement provision. If a plaintiff's claim is cognizable under section 1132(a) . . . it is pre-empted by ERISA. If not, then section 1144 [the preemption clause] does not preempt the claim when asserted under state law.

The Fifth Circuit, like all the Circuit courts to which this argument has been presented, unhesitatingly held it to be inconsistent with ERISA precedent and the intent of Congress. If the Court were to reject this uniform position and accept Petitioner's preemption construct, the result would be to place in the hands of the states the capacity to define the remedies available against ERISA plans with respect to the latter's benefit determinations. Under that construct, each of the states could

determine ERISA plans' potential liabilities for their plan fiduciaries' benefit coverage determinations. Since at least the decision in *Pilot Life*, it has been clear that any such result is wholly at odds with the intent of Congress when it enacted ERISA's preemption clause.

Last, the core premise of Petitioner's argument is unsound. That premise is that ERISA does not provide an appropriate judicial remedy for a wrongful benefit denial. The Appeals Court expressly found that Mrs. Turner had available to her while she was alive, a judicial remedy for FCHP's assertedly wrongful denial of coverage for the Duke Protocol.[3] In its brief to the First Circuit, FCHP included an Appendix consisting of citations to approximately three dozen cases.[4] In each of these ERISA plan beneficiaries sought equitable relief from Federal courts to redress an assertedly wrongful denial by an ERISA plan of coverage for high dosage chemotherapy and bone marrow transplantation. That is the same form of treatment Mrs. Turner claimed she was entitled to have covered.

The record does not disclose why the Petitioner or Mrs. Turner did not pursue this available equitable remedy expressly authorized by ERISA (29 U.S.C. § 1132(a)(1)) before it was too late. The failure to pursue an available remedy, however, should not be confused with the absence of a remedy.

There is no basis for a review by the Court of the decision of the Appeals Court. The law upon which that decision is based is well-settled and founded upon the clearly applicable precedent decided by this Court. There is no evidence of conflict or confusion in the lower courts with respect to either whether

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3. *Turner*, 127 F.3d at 198-99.

4. That Appendix is replicated and included herewith as "Appendix A."

that precedent permits damage remedies under ERISA, or whether ERISA's preemption of state law claims depends upon the availability of a parallel ERISA remedy. Review is particularly unwarranted in this case. Petitioner's claims exist only because a readily available judicial remedy under ERISA was not timely pursued. That remedy might have helped Mrs. Turner herself if FCHP's interpretation of the plan documents were not justified. The remedy Petitioner now seeks, in contrast, does nothing for her, only provides pecuniary benefit to others and seeks only to have a punitive effect on FCHP. Congress, as this Court consistently has held, did not provide or intend that ERISA plans were to be subject to these remedies.

CONCLUSION

For these reasons, it respectfully is submitted that The Petition for Writ of Certiorari from the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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